



Department of Toxic Substances Control



Winston H. Hickox
Agency Secretary
California Environmental
Protection Agency

Edwin F. Lowry, Director
1001 "I" Street, 25th Floor
P.O. Box 806
Sacramento, California 95812-0806

Gray Davis
Governor

TITLE 22

45-DAY PUBLIC NOTICE AND COMMENT PERIOD

PROPOSED REGULATIONS

LAND USE COVENANTS

Department Reference Number: R-99-17

NOTICE IS HEREBY GIVEN that the Department of Toxic Substances Control (DTSC) proposes to amend the California Code of Regulations, title 22, division 4.5, chapter 39 by adding a new section 67391.1. These regulations would establish the requirement to record land use covenants when residual contamination is left in place that is incompatible with unrestricted land use. These proposed regulations will clarify when it is appropriate for DTSC to require land use covenants, to record land use covenants, and the exceptions to these requirements. Land use covenants are also commonly referred to as "deed restrictions," "covenants, conditions, and restrictions," and "institutional controls." Recorded land use covenants are binding on all current and future property owners.

The purpose of recorded land use covenants is to protect the public health and safety and the environment when residual contamination is left in place and to prevent incompatible use of contaminated land or the surrounding property. The contamination could be hazardous materials, hazardous wastes, waste constituents, or hazardous substances that are left in place upon closure of a hazardous waste disposal facility, as part of either a short or long-term stabilization action, a corrective action, or a planned removal or remedial action.

PUBLIC HEARING AND WRITTEN COMMENT PERIOD

DTSC will hold a public hearing on the proposed regulations at 10:00 a.m. on **July 30, 2002**, in the Central Valley Auditorium, 2nd Floor, 1001 "I" Street, Sacramento, California, at which time any person may present statements or arguments orally or in writing, relevant to this proposal. Please submit written comments to the contact person listed at the end of this notice. Written comments on the rulemaking submitted no later than 5:00 p.m. on **July 30, 2002** will be considered.

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our Web-site at www.dtsc.ca.gov.

Representatives of DTSC will preside at the hearing. Persons who wish to speak are requested to register before the hearing. Pre-hearing registration will be conducted at the location of the hearing from 9:30 a.m. to 10:00 a.m. Registered persons will be heard in the order of their registration. Any other person wishing to speak at the hearing will be afforded an opportunity after the registered persons have been heard.

AUTHORITY AND REFERENCE

Authority: chapter 6.8, Health and Safety Code section 25351.5; reference: chapter 6.8, Health and Safety Code section 25355.5 and 25356.1.5; and the authority in chapter 6.5, Health and Safety Code section 25150; reference: chapter 6.5, Health and Safety Code sections 25202.5, 25222.1, and 25223; chapter 6.85, Health and Safety Code sections 25398.6(l), 25396(l), and 25398.7; and the California Code of Regulations, title 22, division 4.5, sections 66264.119 and 66265.119.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

This rulemaking affects the California Code of Regulations, title 22, division 4.5, chapter 39, by adding section 67391.1. These proposed regulations would establish the requirement to record land use covenants, which may do all of the following: (1) Ensure that information is made available to local government agencies and the public regarding property containing residual hazardous materials, hazardous wastes, waste constituents, or hazardous substances (because recorded land use covenants are binding on all current and future property owners); (2) Are required to be disclosed to real estate transaction participants (buyers, sellers, lending and financial institutions, real estate brokers and agents) indicating that the property in question contains residual contamination; (3) Ensure that long-term cleanup actions or measures or monitoring requirements are carried out and maintained as established by DTSC; and (4) Ensure that subsequent property owners or lessees have a duty to assume responsibility for any requirements or restrictions pertaining to residual contamination when they take over the property, such as maintaining an asphalt cap over soil to prevent soil contamination from being inhaled, ingested, or from coming into direct contact with nearby residents, workers, students, teachers, or the public at large.

The proposed regulations are needed to clarify when it is appropriate for DTSC to define land use restrictions or covenants, to record land use covenants, and the exceptions to the requirements when the federal government owns or controls properties that have residual contamination in place.

These regulations would require DTSC to clearly set forth and define land use limitations or covenants in a remedy selection or response action decision document

prior to approving or concurring with a facility closure, corrective action, Removal Action Workplan (RAW), Remedial Action Plan (RAP), or other similar document when contamination will remain at the property at levels which are not suitable for unrestricted use of the land. The proposed regulations are also needed to clearly establish that DTSC will not certify that a site cleanup has been satisfactorily completed (except for any necessary long-term operation and maintenance activities) until any required land use covenant has been signed by DTSC and the property owner and recorded in the County Recorder's Office where the property is located. These regulations would apply to site cleanup activities being conducted under the legal authorities of chapters 6.5, 6.8, or 6.85 of the Health and Safety Code, or at school sites where DTSC is overseeing the investigation and cleanup actions pursuant to the Education Code.

The proposed regulations are also needed to address situations involving property transfers for land owned by the federal government. DTSC has experienced problems when contamination (hazardous materials, hazardous wastes, waste constituents, or hazardous substances) is left in place at federally-owned lands, including military bases, and the federal agency has requested that the property be determined as "suitable for transfer," so that redevelopment can commence. These regulations would require appropriate land use covenants to be executed by DTSC and the federal agency (property owner) and properly recorded before the property could be determined as "suitable for transfer."

The proposed regulations contain an exception for federally-owned properties when DTSC determines that it is not feasible to record a land use covenant, such as transfers from one federal agency to another. With federally owned property (such as at an active military base), there usually is no deed to the property, so a land use covenant, which is a restriction on the deed that runs with the land in perpetuity, is not feasible. In these cases, DTSC will look at other options such as amending the facility master plan, installing physical monuments or entering into agreements between the facility and DTSC.

In addition to federally owned properties, there are other types of property in California which do not have formal deeds in County Recorders offices. For example, some current or former tidelands or submerged properties are owned generally by the State of California. In these cases, DTSC will look at other mechanisms such as installing physical monuments or entering into a memorandum or consent agreement with the entity controlling the property.

CALIFORNIA ENVIRONMENTAL QUALITY ACT COMPLIANCE

The proposed regulations are a project under the California Environmental Quality Act (CEQA). However, they are eligible for an exemption under title 14, section 15061 (b) (3), since it can be seen with certainty that there is no possibility that the rulemaking may have a significant environmental effect. These regulations will not result in potential for significant environmental impacts because they only enunciate the process for restricting contaminated properties and do not set the criteria for site clean ups or determine the levels of contaminants left in place. Therefore, these regulations will not result directly or indirectly in possible adverse physical changes to the environment. The use of land use covenants as part of a site remediation or facility closure is a well established practice under state and federal law. A draft of the Notice of Exemption (NOE) is available for review with the rulemaking file and will be filed with the State Clearinghouse when the regulations are adopted.

PEER REVIEW

Under the provisions of Health and Safety Code section 57004, peer review is not required because the proposed regulations do not establish a regulatory level, standard or other requirement subject to scientific peer review.

BUSINESS REPORT

DTSC has determined that this rulemaking will not require businesses to write a new report, as defined by Government Code section 11346.3 (c).

FISCAL IMPACT ESTIMATES

Mandates on Local Agencies and School Districts: DTSC has made a preliminary determination that adoption of these regulations will create no new local mandates.

Estimate of Potential Cost or Savings to Local Agencies Subject to Reimbursement: DTSC has made a preliminary determination that adoption of these regulations will not impose a local mandate or result in costs subject to reimbursement pursuant to part 7 of division 4, commencing with section 17500, of the Government Code or other nondiscretionary costs or savings to local agencies.

Cost or Savings to Any State Agency: DTSC has made a preliminary determination that the proposed regulations will have no impact on State revenue or costs.

Cost or Savings in Federal Funding to the State: DTSC has made a preliminary determination that the proposed regulations will have no impact on Federal revenue or costs.

Effect on Housing Costs: DTSC has made an initial determination that there will be no impact on housing costs.

Cost Impacts on Representative Private Persons or Businesses: The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Significant Statewide Adverse Economic Impact on Businesses: DTSC has made an initial determination that the proposed regulations will not have a significant statewide adverse economic impact directly affecting businesses, including the ability to compete with businesses in other states.

Assessment Statement:

- (A) **Creation or Elimination of Jobs within California** - DTSC has made a preliminary determination that no jobs will be created or eliminated in California as a result of the proposed regulations.
- (B) **Creation of new businesses or the elimination of existing businesses within California** - DTSC has made a preliminary determination that no businesses will be created or eliminated in California as a result of the proposed regulations.
- (C) **Expansion of businesses currently doing business in California** - DTSC has made a preliminary determination that no businesses in California will be expanded as a result of the proposed regulations.

Effect on Small Businesses: DTSC has determined that provisions of this rulemaking will not have a significant adverse economic impact on small businesses.

CONSIDERATION OF ALTERNATIVES

DTSC must determine that no reasonable alternative it considered or that has otherwise been identified and brought to the attention of DTSC would be more effective in carrying out the purpose for which the action is proposed, or would be as effective and less burdensome to affected private persons than the proposed action. DTSC invites

interested persons to present arguments, with respect to the various options, at the scheduled hearing, or during the written comment period.

AVAILABILITY OF TEXT OF REGULATIONS AND STATEMENT OF REASONS

Copies of the Notice, Initial Statement of Reasons and the text of the proposed regulations are posted to DTSC's Internet site at <http://www.dtsc.ca.gov> or may be obtained from Ms. Joan Ferber of DTSC's Environmental Analysis and Regulations Section as specified below. The information upon which DTSC relied is also available at the address listed below.

POST-HEARING CHANGES

After the close of the comment period, DTSC may adopt the proposed regulation. If substantial changes are made, the modified text will be made available for comment for at least 15 days prior to adoption. Only persons who request the specific proposed regulations, attend the hearing, or provide written comments on these specific regulations will be sent a copy of the modified text, if substantive changes are made.

Once regulations have been adopted, DTSC prepares a Final Statement of Reasons which updates the Initial Statement of Reasons, summarizes how DTSC addressed comments and includes other materials, as required by Government Code section 11346.9. Copies of the Final Statement of Reasons may be obtained from Ms. Joan Ferber at the address listed below. A copy of the Final Statement of Reasons will also be posted on DTSC's Internet site at <http://www.dtsc.ca.gov>, along with the date the rulemaking is filed with the Secretary of State and the effective date of the regulations.

CONTACT PERSONS

Inquiries regarding technical aspects of the proposed regulations or CEQA documents may be directed to Ms. Kathleen Hartshorne of DTSC's Site Mitigation Program at (916) 323-3395 or, if unavailable, Ms. Cathleen Pierce of DTSC's Site Mitigation Program at (916) 324-5790. However, such oral inquiries are not part of the rulemaking record.

Statements, arguments or contentions regarding rulemaking and/or supporting documents must be submitted in writing or may be presented orally or in writing at the public hearing in order for them to be considered by DTSC before it adopts, amends, or repeals these regulations. To be included in this regulation package's mailing list, and

to receive updates of this rulemaking, please leave a message on the DTSC mailing list phone line at (916) 324-9933 or e-mail: regs@dtsc.ca.gov.

Please direct all written comments, procedural inquiries and requests for documents by mail, e-mail or fax to:

Ms. Joan Ferber, Regulations Coordinator
Environmental Analysis and Regulations Section
Department of Toxic Substances Control

Mailing Address: P.O. Box 806
Sacramento, California 95812-0806

E-mail Address: regs@dtsc.ca.gov

Fax Number: (916) 323-3215

Ms. Ferber's phone number is (916) 322-6409. If Ms Ferber is unavailable, please call Ms. Nicole Sotak at (916) 327-4508 or Mr. James McRitchie at (916) 327-8642.

Dated: _____

James McRitchie, Chief
Office of Environmental Analysis,
Regulations and Audits